The Divisional Court have taken a different view. They said that, once it appeared that no public money had been spent on this road, then the burden of proof shifted on to the frontagers to show that it was a highway repairable by the inhabitants at large. I cannot share that view...

The Divisional Court made a mistake in failing to distinguish between a legal burden imposed by law and a provisional burden raised by the state of the evidence. Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, a provisional presumption arises that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden — sometimes apparent, sometimes real — which may shift from one party to the other, or may remain suspended between them. That is not a legal burden, however, but only a provisional burden — a burden raised by the state of the evidence — from which the court may draw an inference one way or the other, but is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is repairable by the inhabitants at large or not. If it can come to a determinate conclusion, no question of the legal burden arises; but, if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to say that the local authority have not proved the case...

The part played by a legal burden of proof was well stated by Viscount Dunedin in *Robins* v. *National Trust Co.*[7] (at p. 520): '... onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.'"

Upon the evidence given on both sides in the instant case, I think the learned magistrate was fully justified in coming to the conclusion that the loss had been caused "solely by the negligence of the authority or its officers or agents". There was not a ghost of a suggestion on the part of the defence that it was otherwise — and pure speculation as to other possibilities cannot take the place of evidence.

Much of the argument of this appeal, however, has been devoted to the question whether rule 91(1) has the effect of shifting the onus from the bailee to the bailor of proving how the loss came about. I need hardly repeat that the very fact that the question of onus is so hotly disputed is proof enough that the rule suffers from ambiguity and on that account the *contra proferentem* rule ought to be applied. In the absence of clear and unequivocal language to the contrary, I am of opinion that the onus still lies on the authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on its part. In the instant case the evidence was conclusive in the appellants' favour; the onus as a determining factor, therefore, did not arise. I would accordingly allow the appeal and restore the judgment of the learned magistrate, with costs to the appellants in both appeals.

Suffian and **Gill F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

PESUROHJAYA IBU KOTA KUALA LUMPUR v. PUBLIC TRUSTEE & ORS.

[O.C.J. (Raja Azlan Shah J.) April 9, 1971]

[Kuala Lumpur — Originating Summons No. 440 of 1970]

Local Government — Squatters — Removal of — Costs and compensation — Recovery of — Attachment of land — Town Boards Enactment (F.M.S. Cap. 137), s. 50 — Essential (Clearance of Squatters) Regulations, 1969, regs. 10(2) and 10A(1).

Interpretation of Statutes — Amendment to Regulations — Retrospective operation — Effect of.

Practice and Procedure — Nature of action — Whether to be proceeded by writ or originating summons.

This was a claim by way of originating summons for costs and compensation amounting to $338,378.45 for removal of squatters by the applicant. The applicant applied for an order that the holding from which the squatters had been cleared, be attached and sold pursuant to the provisions of section 50 of the Town Boards Enactment (Cap. 137) and regulations 10(2) and 10A(1) of the Essential (Clearance of Squatters) Regulations 1969. The respondents are co-proprietors of the said land. They contended that the procedure adopted by the applicant was wrong in law because disputed questions of fact and law were involved. They further contended that regulation 10A was an amendment to the Essential (Clearance of Squatters) Regulations and as such it could not be enforced against the respondents in respect of the squatter clearance carried out on November 30, 1969.

The Essential (Clearance of Squatters) Regulations, 1969 came into force on October 2, 1969. On February 24, 1970, the Regulations were amended and such amendment was deemed to have come into force on October 2, 1969. Demolition work was done on November 30, 1969, that is, before the amendment to the Regulations was made. However, the respondents were billed on March 31, 1970, that is, after the amendment.

Held, allowing the claim: (1) the general rule is that there is a presumption against giving statutes a retrospective operation. The presumption is that the legislature does not intend what is unjust. However, the rule is a mere presumption and as such it may be rebutted by express words in the Act or by circumstances sufficiently strong to replace it. In the present case it was clearly stated in the Regulations that the amendment was to take effect from a date antecedent to its making. Regulation 10A clearly governed the instant case because the amendment had retrospective effect;

(2) when a question of fact is at issue the action is to be by way of writ and not by originating summons. In this case the disputed question of fact would be as to the number of squatter families removed from the land. But with the amendment the method of computing was by way of area. Therefore the question of how many squatter families were removed was not relevant and hence not a fact crucial to the determination of the case. Therefore the procedure adopted by the applicant was in order.

Whether the compensation levied was fair and equitable considered.

The following cases were cited in argument: *Foon Seong* v. *Chan San Choon* [1947] M.L.J. 85; *Ong Yok Chu* v. *Yong Teck Fong* [1960] M.L.J. 292; *Ng Wan Siew* v. *Teoh Sin* [1963] M.L.J. 103; *E'Singam* v. *Dr. Sundram & Ors.* [1960] M.L.J. 91; *Ponniah* v. *Chinniah* [1961] M.L.J. 66; *O.C.B.C.* v. *The Commissioner of the Federal Capital* [1963] M.L.J. 294; *West* v. *Gwynne* [1911] 2 Ch. 15; *Athlumney, Re* [1898] 2 Q.B. 551.

ORIGINATING SUMMONS.

J. L. Tan for the applicant.

V. L. Kandan for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is a claim for costs and compensation for removal of squatters by the Kuala Lumpur Municipality.

The applicant, Pesurohjaya Ibu Kota, Kuala Lumpur, applied by way of originating summons for an order that the holding comprised under C.T. No. 4744 on lot No. 291, section 46, situated at Lorong Gombak (hereinafter referred to as the 'said land') be attached and sold pursuant to the provisions of section 50 of the Town Boards Enactment (Cap. 137) and regulations 10(2) and 10A(1) of the Essential (Clearance of Squatters) Regulations 1969 to recover the sum of $338,378.45 being costs and expenses under regulation 10(2) and compensation under regulation 10A(1) and fees with interest thereon at the rate of 6% per annum from June 9th, 1970 until payment and costs of the application.

The facts of the case are as follows: The applicant is the Pesurohjaya Ibu Kota, Kuala Lumpur and the four respondents are the Public Trustee, Malaya for the Public Trustee, Singapore as administrator of the estate of Hardial Singh s/o Moher Singh, Harban Singh s/o Jagat Singh and Harban Singh s/o Jagat Singh and Talok Singh s/o Jagat Singh as personal representatives of the estate of Pritam Singh s/o Jagat Singh and Ng Chin Siu and Sons Rubber Estate Ltd.

The respondents are co-proprietors of the said land. The applicant caused the squatters to be removed from the said land, under the Essential (Clearance of Squatters) Regulations 1969. The squatter huts were demolished on November 30th, 1969. On March 31, 1970 the applicant served a bill for a sum of $307,609.45 on the co-proprietors of the said land. When the respondents did not settle the bill, a notice of demand dated 20th May 1970 was served on them. When the respondents still did not pay. a warrant of attachment was issued on 9th June 1970 pursuant to section 47 of the Town Boards Enactment. However. the warrant of attachment could not be executed because there were no movable properties on the said land. The applicant thereupon made an application to this court that the holding itself be attached to recover the costs, expenses and compensation. The applicant now claims an additional sum of $30,771.00 as fees payable in respect of the notice of demand and warrant of attachment.

The sum of $338,378.45 claimed is for the following:

1.	Cost and expenses under reg. 10(2) — —	$ 13,522.00
2.	Compensation under reg. 10A(1) — —	294,084.45
3.	Notice of demand — — — —	1.00
4.	Warrant of attachment fee — — —	30,770.00
		$338,378.45

The respondents contend that the procedure adopted by the applicant is wrong in law because disputed questions of fact and law are involved. They further contend that regulation 10A is an amendment to the Essential (Clearance of Squatters) Regulations, as such it cannot be enforced against the respondents in respect of the squatter clearance carried out on 30th November 1969. The respondents agreed that the applicant incurred costs and expenses under regulation 10(2) of the 1969 Regulations. This amounts only to $13,523.00 and their liability if at all is only for this sum. There is also disagreement between respondents and the applicant as to the number of squatter families removed. Further, the respondents claim that the applicant is indebted to them for a sum of $310.375.00 being compensation for acquisition of 12,415 square feet of the respondents' land. This counter-claim has however been withdrawn.

I shall first deal with the retrospective nature of the amendment. The Essential (Clearance of Squatters) Regulations, 1969 came into force on 2nd October, 1969. On 24th February 1970, the Regulations were amended and were deemed to have come into force on 2nd October 1969. Demolition work was done on 30th November 1969, i.e., before the amendment to the Regulations was made. But the respondents were billed on 31st March 1970, i.e. after the amendment.

The general rule is that there is a presumption against giving statutes a retrospective operation. The presumption is that the legislature does not intend what is unjust. The learned author of *Craies'* on Statute Law (6th ed.) at p. 386, defines a retrospective statute as one

> "which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty; or attaches a new disability, in respect to transactions or considerations already past."

The rule is however, a mere presumption and as such it may be rebutted by express words in the Act or by circumstances sufficiently strong to replace it. In the present case it is clearly stated in the Regulations that the amendment is to take effect from a date antecedent to its making. Regulation 10A clearly governs the instant case because the amendment has retrospective effect.

A statute that is retrospective is not necessarily unjust or oppressive. Again I quote from *Craies'* Law of Statute at page 387:

> "It is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement..."

It is not very difficult to see that the retrospective effect of the amendment has created new obligations and burdens on the respondents. But at the same time it confers a benefit on a section of the public namely the squatters. Under regulations 16(1) (as amended) the sums of money payable under regulation 10A is paid into a fund known as the Squatters Rehousing and Rehabilitation Fund. Some of the families removed from the said land have already been housed in low-cost flats specially built for them by the government.

The next point to consider is whether the compensation levied is fair and equitable. The applicant

is charging on the basis of 55 cents per square foot under regulation 10A(1) which reads:

"10A(1). Notwithstanding the provisions of regulations 7 and 10 if the local authority has served notice upon the occupier in pursuance of regulation 8 or 10 the owner shall pay to the local authority in addition to the cost and expenses payable under regulation 7 or 10 a sum of money as the local authority may in its absolute direction decide calculated at the rate of not less than 5 cents and not more than 200 cents per square foot of the whole area of the land but in any event the sum payable shall not be less than one thousand dollars and not more than three times the amount of the annual value of the holding.

(2) The decision of the local authority under paragraph (1) shall be final and shall not be questioned in any courts."

Before the amendment compensation was levied at the local authority's discretion according to the number of squatter families removed [see regulation 7(a) sub-para (v) and regulation 10(2)]. Regulation 7(a) sub-para (v) has been deleted by the 1970 amendment and the basis of levying compensation is substituted with that of regulation 10A. Since the value of the land has appreciated four-fold from $2,000,000.00 before demolition to $8,000,000.00 after demolition, the rate of 55 cents per square foot is in my view fair and equitable. Had it been levied on the old basis, it would have been quite a substantial sum in view of the fact many families were removed.

I now come to the question of procedure. The respondents contend that the action should have proceeded by way of writ and not originating summons because disputed questions of fact and law are involved. When a question of fact is at issue action is to be by way of writ and not by originating summons. This is because the facts have to be established by examination and cross-examination of witnesses. In the present case the disputed question of fact would be as to the number of squatter families removed from the said land. The question now is whether the number of squatter families is a relevant question rendering it necessary to be established by examination of witnesses in court. The determination of number of squatter families would be crucial under the unamended 1969 Regulations because the mode of computing compensation under regulation 7(a)(v) is by squatter families. But with the amendment the method of computing is by way of area.

I have said earlier that the amendment applies retrospectively and so the basis of levying compensation is by area and not squatter families removed. As such the question of how many squatter families are removed is not relevant and therefore not a fact crucial to the determination of the case. Therefore the procedure adopted by the applicants is in order.

The counterclaim by the respondents has been withdrawn and I will not express any view on it.

I therefore order that the holding be attached and sold pursuant to section 50 of the Town Boards Enactment (Cap. 137) to recover the sum of $338,378.45 as costs and compensation for removal of squatters together with interest at 6% per annum from 9th June 1970 until payment and costs of this application.

Claim allowed.

Solicitors: *Shook Lin & Bok; Shearn Delamore & Co.*

PUBLIC FINANCE BHD. v. NARAYANASAMY

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) April 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 123 of 1970]

Land Laws — Indefeasible title —Fraud — National Land Code, s. 340.

The respondent had purchased a large piece of land with the view to reselling subdivided portions thereof. The respondent executed a charge over 187 acres of the land to secure the repayment of $440,000 to the appellants. The appellants knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers who had gone into possession of their respective areas upon part-payment of approximately 4/7 of the purchase price. The appellants subsequently applied to court for an order for sale of the whole of the 187 acres charged to them to recover the principal and interest due to them. Three of the sub-purchasers applied to be added as respondents. The object of these sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any ordes of sale made by the court. The appellants opposed the intervention of the sub-purchasers and contended that they need pay no regard whatsoever to the rights of the sub-purchasers. The learned trial judge found that the appellants were guilty of fraud and collusion and dismissed the application of the appellants. On appeal,

Held, dismissing the appeal: the appellants' insistence that the interveners had no rights whatsoever, except a right to damages against the respondent for breach of contract, was so plainly unconscionable that the learned judge was justified in holding that they were guilty of fraud and collusion.

FEDERAL COURT.

Henry Cheah (*E. K. Yeap* with him) for the appellants.

Tan Sun Cheong for the respondent.

M. Sivalingam for the first and second interveners.

S. Jayabalan for the third intervener.

Ong C.J. (Malaya) (delivering the judgment of the court): The chargor, respondent in this case, was the fragmentor of an estate, who had purchased a large piece of land with the view to reselling subdivided portions thereof at a considerably higher price than he had paid for it per acre. This has been a common practice of speculators in Malaya for more than ten years past of which financiers like the appellants must undoubtedly have been well aware.

On December 31, 1968 the respondent executed a charge over approximately 187 acres of land held under Certificate of Title No. 20924 to secure the repayment of $440,000 to the chargees, the appellants herein. The appellants knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers who had gone into possession of their respective areas upon part payment of approximately 4/7 of the purchase price. As regards the balance due